

ORDER NO. 5496

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Michael Kubayanda, Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Competitive Product Prices
Inbound E-Format Letter Post

Docket No. CP2020-120

ORDER GRANTING MOTIONS FOR
ACCESS TO NON-PUBLIC MATERIALS

(Issued April 30, 2020)

I. INTRODUCTION

On April 10, 2020, the Postal Service filed notice of specific rates not of general applicability for Inbound E-Format Letter Post for 2021.¹ With its Notice, the Postal Service filed several non-public attachments and workpapers. See Notice. Both United Parcel Service, Inc. (UPS) and the Association for Postal Commerce (PostCom) filed requests for access to non-public information.

¹ Notice of the United States Postal Service of Specific Rates Not of General Applicability for Inbound E-Format Letter Post for 2021, and Application for Non-Public Treatment, April 10, 2020 (Notice).

II. POSITIONS OF THE PARTIES

A. UPS and PostCom Motions

On April 20, 2020, UPS filed a motion for access to non-public versions of Attachments 2 and 4 of the Postal Service's Notice, and associated workpapers "RDCTD 2021 Pckts CP2020-120.xlsx" and "RDCTD 2021 Rgstrd CP2020-120.xlsx."² UPS states that 11 of its representatives require access to the non-public data in order to assist in making informed comments in this docket. UPS Motion at 2. UPS explains that "[t]he requested materials are relevant to assessing whether the Postal Service's proposed rate complies with the [requirement] that the Postal Service's competitive products pay their own costs, without subsidy from market-dominant products." *Id.* In support of the UPS Motion, UPS provides a statement of compliance with protective conditions and certifications signed by all representatives, in accordance with 39 C.F.R. § 3011.301. *Id.* Exhibit 1.

On April 21, 2020, PostCom filed a similar motion requesting access to non-public versions of Attachments 2 and 4 of the Postal Service's Notice.³ PostCom states that two of its representatives require access to the non-public data in order to effectively participate in this docket. PostCom Motion at 1. PostCom maintains that, because it is "not a foreign postal operator or involved in any way in setting prices for any foreign postal operators," disclosure of the non-public information will not cause any harm to the Postal Service. *Id.* at 1-2. In support of the PostCom Motion, PostCom provides a statement of compliance with protective conditions and certifications signed by both representatives, in accordance with 39 C.F.R. § 3011.301. *Id.* at 3-6. The certifications signed by both representatives request access to Attachments 1 and 4 of

² United Parcel Service, Inc.'s Motion Requesting Access to Non-Public Materials Under Protective Conditions, April 20, 2020, at 1 (UPS Motion).

³ Motion of the Association for Postal Commerce for Access to Nonpublic Materials, April 21, 2020, at 1 (PostCom Motion).

the Postal Service's Notice, whereas the PostCom Motion indicates the request for access relates to Attachments 2 and 4 of the Postal Service's Notice.⁴

B. Postal Service Response

On April 27, 2020, the Postal Service filed its response to the access requests submitted by both UPS and PostCom.⁵ Although the Postal Service states that it objects to both motions in part, the Postal Service focuses its objection on UPS's request for access to certain workpapers. Postal Service Response at 1-2. It maintains that "[t]he scope of the requested access is overbroad" and that the requests risk "inadvertent public disclosure or competitive misuse of the country-specific data" that "threaten harm in the competitive marketplace." *Id.* at 2. It also states that UPS made no showing as to why all of the data within the workpapers are necessary for it to provide comments on the issues relevant to this case. *Id.* The Postal Service states that the Commission should limit the scope of access to Attachments 2 and 4, or, if the Commission grants access to the non-public workpapers requested by UPS, it should deny access to the country-specific figures. *Id.* at 3. In addition, the Postal Service attached letters of opposition from several of the designated postal operators with which it exchanges substantial volumes of mail. *Id.*; see also *id.* Attachments 1, 2, and 3.

III. COMMISSION ANALYSIS

A. Legal Standard

The Postal Service may seek non-public treatment for materials that are submitted to the Commission if such information would be exempt from disclosure pursuant to 39 U.S.C. §§ 410(c), 504(g), 3652(f), or 3654(f). 39 C.F.R. § 3011.101(a).

⁴ See *id.* at 1, 5, 6. The Commission notes that the signed certifications request access to "Attachment I," which the Commission construes as "Attachment 1" for purposes of this Order.

⁵ Response of the United States Postal Service to Motions of United Parcel Service Inc. and the Association for Postal Commerce Requesting Access to Non-Public Materials Under Protective Conditions, April 27, 2020 (Postal Service Response).

Under 39 U.S.C. § 504(g)(3), the Commission has specific authority to determine whether production of the non-public material is required in the course of “any discovery procedure established in connection with a [proceeding before the Commission].” 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) provides that, in the context of discovery, the Commission may disclose information obtained from the Postal Service if the disclosure is found to be appropriate and consistent with the kind of balancing of interest that is performed by federal civil courts when asked to establish protective conditions under Fed. R. Civ. P. 26(c). 39 U.S.C. § 504(g)(3)(B). Specifically, the statute requires the Commission to establish procedures by regulation based on Fed. R. Civ. P. 26(c) to ensure “appropriate confidentiality for information furnished to any party.” 39 U.S.C. § 504(g)(3)(B).

The Commission’s regulations governing access to non-public information codify this statutory requirement by setting forth rules providing for access to non-public materials along with strict protective conditions based on Fed. R. Civ. P. 26(c). In the rulemaking proceeding amending the rules relating to non-public information, the Commission provided an overview of how the rules function:

Recognizing that public disclosure of certain information may be commercially harmful to the Postal Service, other persons, or both, existing 39 CFR part [3011] permits the filing of commercially sensitive information to be non-public (also known as ‘sealed’ or ‘under seal’). At the same time, acknowledging the need for transparency, existing 39 CFR part [3011] provides for procedures to allow for a person to request that non-public materials be disclosed to the public (also known as ‘unsealed’). Moreover, existing 39 CFR part [3011] provides for procedures to allow for persons to request access to non-public materials, subject to protective conditions, in order to meaningfully participate in Commission proceedings.⁶

The UPS and PostCom Motions relate to procedures governing requests for access to non-public materials subject to protective conditions under subpart C of 39

⁶ Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018, at 2 (Order No. 4403).

C.F.R. part 3011. Subpart C of 39 C.F.R. part 3011 sets forth rules that “allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions.”⁷

As directed by 39 U.S.C. § 504(g)(3)(B), the rules in subpart C of 39 C.F.R. part 3011 state that “[i]n determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3011.301(e). Federal Rule of Civil Procedure 26(c) provides that a “court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” upon a motion from “[a] party or any person from whom discovery is sought . . . [coupled with] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1).

The party opposing access to non-public information, analogous to requesting a protective order under Fed. R. Civ. P. 26(c), “bears the burden of making the showing of good cause contemplated by the rule and therefore must make a specific demonstrative of facts in support of the request[.]”⁸ Courts reviewing a request for a protective order “must weigh the movant’s proffer of harm against the adversary’s significant interest in preparing for trial.” *Smith*, 322 F.R.D. at 99 (internal citations and marks omitted). When determining whether to limit or deny discovery under this rule, the United States Court of Appeals for the District of Columbia balances several factors including “the requester’s need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material, and the harm which

⁷ Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 65 (Order No. 4679).

⁸ *Smith v. Yeager*, 322 F.R.D. 96, 99 (D.D.C. 2017) (internal citations and marks omitted).

disclosure would cause to the party seeking to protect the information.”⁹ Other federal courts consider additional factors such as whether the party benefiting from a protective order is a public entity or official and whether the information relates to issues important to the public.¹⁰

Accordingly, the Commission’s rules permitting access to non-public materials set forth strict conditions that must be met prior to the disclosure of any information. Section 3011.301 requires that a motion requesting access to non-public materials shall “[i]dentify the particular non-public materials to which the movant seeks access” and “[i]nclude a detailed statement justifying the request for access[.]” 39 C.F.R. § 3011.301(b)(1) and (2). Additionally, “[i]f access is sought to aid participation in any pending Commission proceeding, the motion shall identify all proceedings (including compliance proceedings) in which the movant proposes to use the materials and how those materials are relevant to those proceedings[.]” 39 C.F.R. § 3011.301(b)(2)(i). The motion must “[a]ttach a description of protective conditions completed and signed by the movant’s attorney or non-attorney representative,” and it must “[a]ttach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access[.]” 39 C.F.R. § 3011.301(b)(5) and (6). Furthermore, for individuals to be eligible for access, they must not be involved in “competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials[.]”¹¹

⁹ *Burka v. U.S. Dep’t. of Health & Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996). Here, because the Postal Service has already provided the information at issue, the burden of producing the requested material is not a factor in the Commission’s analysis.

¹⁰ *Castellani v. Atlantic City*, 102 F. Supp. 3d 657, 665 (D.N.J. 2015).

¹¹ 39 C.F.R. § 3011.300(b). An individual is involved in “competitive decision-making” if he or she “consult[s] on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.” 39 C.F.R. § 3011.300(b).

In reviewing the UPS and PostCom Motions and the Postal Service Response, the Commission will first determine whether both parties complied with the Commission's rules governing access to non-public material. If both parties complied, the Commission will then balance the interests of the parties to determine whether access should be granted or whether good cause has been shown to deny access.

B. UPS and PostCom Motions for Access Satisfy Section 3011.301

In accordance with section 3011.301, the UPS and PostCom Motions include a list of non-public information to which each requests access,¹² specify that access is for the purpose of assisting the filing of comments in this proceeding,¹³ and provide the requisite statements of protective conditions and signed certifications from each individual for whom UPS and PostCom seek access.¹⁴ Therefore, the UPS and PostCom Motions satisfy the requirements under section 3011.301 and meet the necessary conditions to receive access to non-public information under protective conditions.

Both Motions properly identify the non-public information sought for the purpose of reviewing the Postal Service's compliance with statutory and regulatory requirements in this docket.¹⁵ The Commission has previously recognized that the need to access non-public data for the purposes of participating in a proceeding is a legitimate purpose upon which the Commission may grant access.¹⁶

¹² UPS Motion at 1; PostCom Motion at 1.

¹³ UPS Motion at 2; PostCom Motion at 2.

¹⁴ UPS Motion, Exhibit 1; PostCom Motion at 3-8.

¹⁵ UPS Motion at 1-2; PostCom Motion at 2.

¹⁶ Docket No. RM2016-10, Order Granting Motion for Access to Non-Public Materials Filed Under Seal, October 11, 2016, at 4 (Order No. 3560). In Order No. 3560, the Commission granted UPS access to information filed under seal, which included third party information, on the condition that the parties first file an agreement regarding inadvertent disclosure. Order No. 3560 at 4-5. In a later rulemaking, the Commission added the provision clarifying the rights of any aggrieved third party to seek all available remedies before the Commission or a court of law, thereby alleviating the need for any additional agreements between parties. See Order No. 4679 at 69-70.

Both Motions also comply with the Commission's strict protective conditions required in order to gain access to non-public, commercially sensitive materials. The protective conditions provided under the Commission's rules strictly prohibit any "person involved in competitive decision-making for any individual or entity that might gain competitive advantage" from gaining access to the non-public information at issue. 39 C.F.R. § 3011.300(b); Appendix A. None of the individuals for whom UPS or PostCom request access are involved in competitive decision-making.¹⁷

Additionally, the named individuals for whom access is requested certify that they will not disseminate information contained in the non-public information to any person not granted access and will act to protect the material from any person not authorized to obtain access.¹⁸ The certifications provide that the non-public materials will only be accessed for purposes of informing comments submitted in the instant proceeding and that any violation of the extensive protective conditions may result in sanctions by the Commission against any person who violates these protective conditions and/or on the persons or entities on whose behalf the individual was acting. *Id.* The certifications also certify that the individuals for whom access is requested will comply with the rules for termination of access in 39 C.F.R. § 3011.304.¹⁹

Therefore, UPS and PostCom have demonstrated compliance with the Commission's rules permitting access to non-public information.

C. Postal Service has not made a Showing of Good Cause to Deny Access

The Postal Service has not made a showing of good cause to deny access to UPS's and PostCom's representatives for the reasons discussed below.

The Postal Service contends that UPS's and PostCom's requests risk "inadvertent public disclosure or competitive misuse of the country-specific data" that

¹⁷ UPS Motion at 2; PostCom Motion at 2.

¹⁸ UPS Motion, Exhibit 1; PostCom Motion at 3-6.

¹⁹ *Id.*; see also Postal Service Response at 1 n.2.

“threaten harm in the competitive marketplace.” Postal Service Response at 2. In addition, the Postal Service includes letters from several third party foreign postal operators indicating their opposition to access because they fear that the data will not adequately be protected,²⁰ or stating that access to commercially sensitive information by UPS will jeopardize their business.²¹

The Commission did address these types of arguments specifically in the FY 2018 and FY 2019 Annual Compliance Review dockets, noting that the presence of confidential and commercially sensitive information is not sufficient justification by itself to deny access.²² The rules permitting access take into consideration that information filed under seal with the Commission may contain sensitive commercial information and implement stringent safeguards to prevent the harms alleged by the Postal Service and the third parties.²³ Moreover, the assertion that commercial harm might occur ignores the many requirements and protective conditions for any party requesting access to non-public information.

First, section 3011.300(b) provides that “[n]o person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials.” 39 C.F.R. § 3011.300(b). The Commission’s rules define “competitive decision-making” as including activities such as “consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and

²⁰ See Postal Service Response, Attachment 2 at 1.

²¹ See Postal Service Response, Attachment 3 at 1; Postal Service Response, Attachment 1 at 1-2.

²² Docket No. ACR2018, Order Granting Motion for Access, February 8, 2019 (Order No. 4998); Docket No. ACR2019, Order Granting Motion for Access, January 29, 2020 (Order No. 5416).

²³ The Commission notes that nothing in this Order should be construed as Commission action to determine non-public treatment of the attachments and workpapers at issue. The Commission preliminarily treats materials as non-public when they are filed under seal with the Commission. 39 C.F.R. § 3011.102(a). The Commission has a separate process under 39 C.F.R. § 3011.103 for determining the appropriate degree of protection to be accorded to materials filed under seal that is not at issue in this Order.

composition of bids, offers or proposals.” 39 C.F.R. § 3011.300(b). However, the rules explicitly state that competitive decision-making does not include “rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.”²⁴ This strict prohibition on access mitigates concerns of commercial harm, as any person involved in competitive decision-making is not permitted access to non-public materials.²⁵ In their opposition to access, neither the Postal Service nor the third parties claim that the designated persons requesting access have any involvement in competitive decision-making.

Second, the Commission’s rules place restrictions on the use and misuse of any non-public information and prohibit unauthorized or public disclosure. For example, persons with access are prohibited from “disseminat[ing] the materials or the information contained therein, in whole or in part, to any person not allowed access[.]” 39 C.F.R. § 3011.302(a). Additionally, the non-public materials may only be used “for the purposes for which the non-public materials [were] supplied.” 39 C.F.R. § 3011.302(b). Here, UPS and PostCom may only use the non-public materials to inform their participation in this docket. In addition, the Commission’s rules require individuals with access to take reasonable care in protecting the non-public material from any person not granted access. 39 C.F.R. § 3011.302(c). Reasonable care is defined to be the “same degree of care . . . to prevent the unauthorized disclosure of these materials

²⁴ *Id.* This is consistent with federal court restrictions on access to highly confidential information to independent outside counsel. See, e.g., *W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, No. 11-CV-01611, 2014 WL 561850, at *1 (D. Colo. Feb. 13, 2014) (“During discovery, [the non-party competitor’s] interest was addressed by a protective order that entitled Western’s counsel and retained experts to view [the non-party competitor’s] wholesale purchase and retail sales information, but forbade the recipients of the information from sharing it with [the plaintiff’s owner] . . .”).

²⁵ The Supreme Court of the United States acknowledged that even when confidential commercial information is at issue, “orders forbidding any disclosure . . . are rare.” *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 n.24 (1979). The Commission’s rules are akin to an “attorney eyes only” protective order, commonly issued by trial courts. *Merrill*, 443 U.S. at 362 n.24; see *U.S. ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 28 (D.D.C. 2002) (Good cause shown for issuance of protective order negated by agreement to exclude plaintiff from access to certain proprietary information and having an “attorney eyes only” agreement).

as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.” 39 C.F.R. § 3011.302(c). These restrictions protect against concerns expressed by the Postal Service and third parties of any potential improper disclosure of the information.

Third, the Commission’s rules provide that the Commission may sanction any person that violates the protective conditions under which he or she gained access. 39 C.F.R. § 3011.303(a). Sanctions include dismissing the proceeding, ruling by default against the person who violated the order, revoking access or restricting access in the future, and other sanctions as deemed appropriate. 39 C.F.R. § 3011.303(a). The Commission’s rules also do not prevent the Postal Service or third parties harmed by any “violation of an order granting access subject to protective conditions, from pursuing any remedies available under the law against the person who violated the order, the persons or entities on whose behalf the person was acting, or both.” 39 C.F.R. § 3011.303(b). These strict sanctions, whether delivered by the Commission or a court of law, provide adequate remedies in the event of any violation for both the Postal Service and any affected third party.

Finally, the Commission’s rules require interested participants seeking access to material filed under seal to comply with strict protective conditions. 39 C.F.R. § 3011.301(b)(5). The statements of protective conditions provided by both UPS and PostCom sufficiently negate concerns regarding improper use of commercially sensitive material.²⁶

Therefore, the Postal Service and third party concerns about the commercially sensitive nature of the information and any potential improper or inadvertent disclosure are mitigated by the numerous protective conditions and prohibitions on improper disclosure of non-public information. Neither the Postal Service nor the third parties

²⁶ *Castellani*, 102 F. Supp. 3d at 668 (Factors for whether good cause exists to prohibit release of information (issue a protective order) are negated by a confidentiality order).

allege any history of improper disclosure by any individual seeking access under protective conditions that would provide grounds for denying access. To the contrary, UPS and PostCom have extensive histories of participating in Commission proceedings and have routinely been granted access to other non-public information without issue.

As mentioned above, federal civil courts consider several factors when balancing the interests to determine whether to grant a request for a protective order under Fed. R. Civ. P. 26(c). Such factors include whether the party benefitting from the protective order is a public entity or official and whether the case involves issues important to the public.²⁷ Here, both of these factors weigh in favor of granting access under the agreed upon protective conditions.

The Commission has routinely recognized the public's interest in participating in Commission dockets that determine the Postal Service's compliance with applicable statutory and regulatory requirements. The Commission finds that denying access to non-public materials would significantly restrict the ability of interested persons to assess the prices proposed by the Postal Service in this docket for compliance with legal requirements. As a portion of the Postal Service's compliance under the law relates to products that contain third party data, prohibiting access to this data on the basis of its commercial sensitivity would negatively impact the public's "interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A).

Here, UPS and PostCom have requested access to information that the Postal Service claims to be commercially sensitive under the strict protective conditions and restrictions set forth by the Commission's rules. The Commission finds that its rules provide adequate protective conditions to prevent any commercial harm or unauthorized disclosure. Having balanced the public interest in the financial transparency of the

²⁷ *Castellani*, 102 F. Supp. 3d at 657 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)).

Postal Service against the Postal Service's claims of commercial harm, the Commission is compelled to grant access.

IV. ADDITIONAL ISSUE

The PostCom Motion requests access to non-public versions of Attachments 2 and 4 of the Postal Service's Notice. PostCom Motion at 1. However, the certifications signed by both PostCom representatives request access to Attachments 1 and 4 of the Postal Service's Notice. See *id.* at 1, 5, 6. The Commission notes that Attachments 2 and 4 contain information claimed to be non-public by the Postal Service while Attachment 1 does not. Thus, before PostCom's representatives are to be given access to Attachments 2 and 4, PostCom must file corrected certifications in this docket.

V. CONCLUSION

For the above reasons, the Commission grants the UPS and PostCom Motions. UPS representatives identified in the UPS Motion shall be granted access to non-public versions of Attachments 2 and 4, and the associated workpapers. Upon filing corrected certifications in this docket, PostCom representatives identified in the PostCom motion shall be granted access to non-public versions of Attachments 2 and 4.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The United Parcel Service, Inc.'s Motion Requesting Access to Non-Public Materials Under Protective Conditions, filed April 20, 2020, is granted.
2. The 11 representatives identified in the UPS Motion shall be granted access to non-public versions of Attachments 2 and 4, and the associated workpapers.

3. The Motion of the Association for Postal Commerce for Access to Nonpublic Materials, filed April 21, 2020, is conditionally granted upon the filing of corrected certifications.
4. The two representatives identified in the PostCom Motion shall be granted access to non-public versions of Attachments 2 and 4 upon the filing of corrected certifications.

By the Commission.

Erica A. Barker
Secretary

Vice Chairman Kubayanda concurring.

CONCURRING OPINION OF
VICE CHAIRMAN MICHAEL KUBAYANDA

The parties' requests for access cover different types of information with different associated risks and benefits from disclosure. There can be little doubt that revealing self declared rates and total product costs allows for meaningful participation in Commission proceedings by, for example, allowing parties to scrutinize and comment on cost coverage mandated by statute and regulation. Such information should be widely available to stakeholders in most instances, let alone under the protective conditions provided here.

Data such as country specific costs in work papers are of a different nature and may require more precise and separate scrutiny. In my opinion, the differences between the information categories could affect the application of the balancing of interests required under 39 U.S.C. § 504(g)(3), as each category of information may pose particular risks and benefits upon disclosure.

Because the access is provided under protective conditions that the Commission has previously found adequate for sensitive data and the Postal Service has not shown these protections to be inadequate, I concur with my colleagues. I believe, however, that it is important to continue to monitor the breadth of these requests for access and carefully consider the risks and benefits of granting access to different types of sensitive information, even under protective conditions.